OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-39

TITLE BURLINGTON NORTHERN RAILROAD COMPANY, ET AL., Petitioners V. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, ET AL.

PLACE Washington, D. C.

DATE February 23, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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BURLINGTON NORTHERN RAILROAD :

COMPANY, ET AL., :

Petitioners, :

V. : No. 86-39

BROTHERHOOD OF MAINTENANCE OF :

WAY EMPLOYEES, ET AL. :

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Washington, D.C.

Monday, February 23, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock a.m.

APPEARANCES:

REX E. LEE, ESQ., Provo, Utah; on behalf of the petitioners.

JOHN O'B. CLARKE, JR., ESQ., Washington, D.C.; on behalf of the respondents.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in No. 86-39, Burlington Northern Railroad Company, versus the Brotherhood of Maintenance of Way Employees.

Mr. Lee, you may proceed whenever you are ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LEE: Mr. Chief Justice, and may it please the Court, one of the prominent features of our federal labor laws is that Congress has singled out two industries, the railroads and the airlines, for special treatment under their own statute, the Railway Labor Act, which differs both in its substance and also in the way it is administered from the National Labor Relations Act.

Those differences are designed to make railway and airline work stoppages more difficult and therefore less likely, reflecting a Congressional judgment that these two industries are particularly strike sensitive, and that the public has much to lose if strikes should occur in those industries.

Indeed, this Court has pointed out several times that the principal purpose of the Railway Labor

Act described in Section 2 and Section 2 first is to minimize the likelihood of railway and airline strikes. The Act has been largely successful in achieving that purpose. The question presented in this case is whether Congress nonetheless intended that these two industries would be the only ones powerless against secondary picketing which is the single device most likely to result in nationally paralyzing strikes.

The holding that we seek is a narrow one. It is simply that there are some circumstances in which federal courts can enjoin secondary picketing of railroads. The Court need not decide -- we are not asking the Court to decide whether all secondary picketing of railroads is enjoinable. Given the facts of this case, where the labor dispute is confined, in the Court of Appeals' words, to a tiny railroad in New England, where the picketing occurred in Los Angeles against a railroad that does not operate within 1,000 miles of New England, and where the purpose of the picketing was, again in the Court of Appeals' words, to shut down the nation's entire railroad system.

Affirmance of the Court of Appeals judgment will require the Court to hold that under no circumstances, regardless of how remote the connection between the labor dispute and the pressure point, and

regardless of how great the damage to the national interest, no court may ever enjoin the picketing of a neutral railroad employer who is a powerless victim in someone else's labor dispute.

QUESTION: You suggest (inaudible) and this is one of them.

MR. LEE: That is correct.

QUESTION: And how do you distinguish in terms of Norris-LaGuardia those cases where an injunction is all right and those that are not?

MR. LEE: We think that the dividing point is the distinction between secondary picketing and primary activity, the same distinction that is drawn in the federal labor laws generally in other contexts, and we think that that follows from --

QUESTION: I thought you said some secondary, truly secondary picketing would be permissible and some not.

MR. LEE: That is correct, and those instances -- what is required is the extent of the alignment between the primary, between the -- the secondary picketing victim, the extent to which that victim has in fact identified itself on the side of the primary --

QUESTION: So you say -- so it has got to do

with whether there is a labor dispute?

MR. LEE: Well, whether there is a labor dispute --

QUESTION: Between the object of the picketing and the employer?

MR. LEE: Yes, and indeed in any instance. What we are saying is that there are some instances in which courts do have the injunction power.

QUESTION: But you say it is not -- this just doesn't arise out of a labor dispute. Picketing in Los Angeles just doesn't arise out of a labor --

MR. LEE: That is --

QUESTION: Is that your argument?

MR. LEE: That is one part of the argument. The heart of our argument is that since that kind of activity, picketing in Los Angeles against a railroad dispute in Maine, is protected by the Railway Labor Act, that that kind of picketing is a violation of the Railway Labor Act, and since this Court --

QUESTION: Because?

MR. LEE: Because the Railway Labor Act was intended, Justice White, to prohibit those activities which violate not only its express terms but also those principles that the courts would derive from its policies, and that clearly was the purpose of the

Railway Labor Act as prescribed --

QUESTION: Well on that basis all secondary picketing should be bad, under the Railroad Labor Act.

MR. LEE: All I am saying is this. In exercise any kind of injunctive remedy the Court always has to look to the particular circumstances to determine whether an injunction is proper or not. All I am really saying is that the fact that the Railway Labor Act does not in its terms deal with secondary picketing does not mean that the Courts do not have their usual injunctive powers where there has been a violation of the Railway Labor Act, and it is to that issue that I now turn.

It really turns on the view that you take of what kind of statute this Railway Labor Act is. The key to the Court of Appeals error in our view was its holding that the Railway Labor Act is not a statute establishing rules but is rather, in the Court of Appeals' words, a statute establishing goals and calling on the judiciary to create the rules. In other words, it is not a statute like the Sherman Act in which the general principles were set forth and then the courts would be, in anticipation the courts would be called on to develop the details.

That premise lies at the very heart of the Court of Appeals rationale and its holding, and it is

just flat wrong. The principal draftsman of the Railway Labor Act was a union lawyer, Mr. Donald Richburg, who described for Congress the general purpose of the statute, and that description as set forth by this Court in a Chicago and Northwestern opinion, and because it does really go to the heart of the case, with the Court's indulgence I will read this brief statement.

We believe, and this law has been written upon the theory that there is more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and then letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America.

QUESTION: Mr. Lee, precisely what do we look at in the Railway Labor Act to find unlawful this secondary picketing? Where do we look? Where is it, and what is it?

MR. LEE: Section 2 first, and Section 2 first prescribes that the parties will do everything in their power to make and maintain agreements in such a way as to minimize the interruption of interstate commerce. Now, how much mileage can you get out of that language, and to what extent can we derive specific rules from the

general provisions of -- from those more general provisions of the Railway Labor Act?

Let me give you just briefly three instances in which this Court has done just exactly that, and we think that the inference that we are asking from the general policy, the most important of the Act's policies, which was to avoid interruption to interstate commerce, is not anything more radical than what this Court has done in those three cases.

QUESTION: You don't think that if Congress had intended to make secondary picketing unlawful at the time that it wrote the Railway Labor Act that it would have said it was?

MR. LEE: No, it would not, for two reasons, Justice O'Connor. One is that it was universally assumed and the Court of Appeals agrees with us on this point, that in 1926, when the Railway Labor Act was adopted, secondary picketing was universally condemned. There is simply no reason to assume that in a statute such as this one, which sets out the general rules and then leaves it to the courts to fill in the details, to assume that Congress would have made any assumption other than that secondary picketing was unlawful at the time.

QUESTION: You say that loosely speaking the

Railway Labor Act is like the Sherman Act in that it sets general goals and lets the courts work out the methods of reaching them rather than the detailed statute.

MR. LEE: That is absolutely right. That is absolutely right, and that lies at the heart of the Court of Appeals error.

The three cases that I would like to point out in which the Court has done just exactly that can be very briefly summarized. The first one is the Chicago River case, which in 1957 upheld an order enjoining the union, notwithstanding the Norris-LaGuardia Act, enjoining the union from striking over minor disputes which were then pending before the National Railroad Adjustment Board, which is the entity that resolves these minor disputes.

The Railway Labor Act does not expressly prohibit that kind off a strike any more than in this case it expressly prohibits secondary picketing, but the Court nevertheless upheld the injunction because the strike, the Court found, was inconsistent with the purposes and the structure of the Act. And the same rule applies with respect to major disputes.

QUESTION: Where was that held?

MR. LEE: In the Supreme Court.

QUESTION: I know, but was it a minor dispute?

MR. LEE: It was a minor dispute, and it was pending before the National --

QUESTION: Any kind of a minor dispute goes to the Railway Labor Board, doesn't it?

MR. LEE: That is correct, but the question was whether the Railway Labor Act prohibits strikes. There is nothing in the statute that says -- that deals with that one way or the other. It was left to this Court to fill in the details.

QUESTION: Yes, but Mr. Lee, isn't there a difference? In that case the Railway Labor Act expressly made the union subject to the obligation to grieve the minor dispute, and there is no such express requirement with regard to secondary picketing.

MR. LEE: Justice Stevens, I am glad you asked that question, because I am going to tell you that if you read that opinion carefully, you will see that there were two things that the Court read into that issue in the Chicago River case. The first was that there was the obligation of compulsory arbitration. That in itself had to be inferred from the general purpose of the Act so that there was actually in the Chicago River case, as I read it, and I am confident my reading is

correct, a double inference that had to be drawn. So I think that distinction did not exist in the Chicago River case.

QUESTION: But the express language of Section 2 first says it is the duty of the carriers to --

MR. LEE: That is correct, and actually the Court devotes several pages to this. The first thing that the Court had to determine was whether that meant compulsory arbitration. Now, to be sure, there isn't quite the level of inference that we are asking you to draw here. But there was in that case really an inference on an inference, and it said nothing about strikes, and that was --

QUESTION: I understand the strikes. The same here. Nothing about strikes. But the basic prohibition against the secondary picketing, you infer from 152 -- you really have argued kind of two ways in your briefs. Part of the time you argue it is based on 152, and part of the time it is based on these old Sherman Act cases that were sort of a predicate for this legislation, and that that was the --

MR. LEE: Yes, and I think that is really two parts of one argument. It is on Section 152, but that in turn is influenced by what the state of the law was in 1926 when the Railway Labor Act was adopted. Now,

turning to major disputes, just very briefly I would like to point out two cases that we think are relevant to this very point. The first is the Florida East Coast case.

That one did not involve an injunction, but it did squarely hold that even after the formal statutory processes for resolving major disputes have been exhausted, that the RLA still imposes limits on the parties' rights of self-help after that point in time, which is squarely inconsistent with what the Court of Appeals held, and it holds that those are to be found not in the RLA's express terms, because there are no express terms dealing with that, but rather from its purposes.

And finally, in the Chicago and Northwest case, the one from which Mr. Richburg's quote is taken, the Court in 1971 held that the courts can enjoin a strike instituted after the major dispute resolution procedures have been exhausted where the conduct of the union -- in that case it was a refusal to bargain in good faith -- violated the purposes of the very section we are relying on, Section 2 first, which requires the parties to make every reasonable effort to avoid interruptions to interstate commerce.

Now, in all three cases strikes over minor

disputes in Chicago River, determination of the limits on the parties self-help rights following exhaustion of the major dispute resolution procedures in Florida East Coast, and the refusal to bargain after exhaustion of those same procedures in Chicago and Northwestern, the relevant RLA principles were found not in the terms of the Act but in its purposes.

QUESTION: Mr. Lee, you didn't mention Jacksonville Terminal, and of course in that case, although it had to do with state court enforcement, the rationale of the court as expressed was that neither the common law nor the NLRA provided sufficient guidance to determine the scope of permissible picketing under the Railway Labor Act. So the reasoning of the Court kind of cuts against your argument here, I think.

MR. LEE: In Jacksonville.

QUESTION: Yes.

MR. LEE: We think not. The opinion, as my friend, Mr. Clarke, will surely remind you when he comes to his turn, is that it can be read in two ways. But we think that two things -- two things, I think, are unavoidable. One is that the holding of the case reaches only the preemption issue. We are not dealing there with the reach of the Railway Labor Act. They were dealing only -- you were dealing only with the

issue of whether state law could apply, and the second is, if you look to what the Court said with respect to the Railway Labor Act, and it appears on Page 390, I submit that Jacksonville Terminal not only is not inconsistent with Chicago River, Chicago and Northwestern, and Florida East Coast, but indeed that it actually supports our position. And I am reading from Page 390, and the relevant language is this.

"The Railway Labor Act drawing upon labor policies evinced by the National Labor Relations Act," and Jacksonville does stand for the proposition that that is proper, "cannot categorically be said that all picketing carrying secondary implications is prohibited."

That is all we are asking in this case, and we think that that language from Jacksonville Terminal is controlling. It cannot categorically be said, the Court said, that the RLA prohibits all secondary picketing, but that is not the issue here. If the case is strong enough, and it certainly is in this case, then the courts ought to be able to prohibit secondary picketing.

The issue here is whether under the RLA any secondary picketing is unlawful, and the narrow holding, the only one that we seek, is that our national labor laws, the Railway Labor Act accommodated with

Norris-LaGuardia and influenced by the National Labor Relations Act, permits some protection against secondary picketing.

QUESTION: Well, then, if we answer that question yes in your favor, is it your idea that the lower courts would work out kind of on an ad hoc basis? There certainly wouldn't be many guidelines, would there?

MR. LEE: Neither would there be many cases, Mr. Chief Justice. I think there would be guidelines, because the Court said in Jacksonville Terminal that you draw from the body of labor policy, particularly the National Labor Relations Act, and that would provide a --

QUESTION: Yes, but you make a point that this picketing was in Los Angeles and the dispute was in Maine. But, you know, if you have a dispute in Boston, if you have the picketing in Boston it would be rather a strange doctrine that said you know, secondary picketing in Los Angeles can be enjoined when the railroad is in Maine but secondary picketing in Boston can't be.

MR. LEE: Yes. Two things. One is, of course, we want to win this case on this case's facts, but I think I agree with you and I think this was probably Justice White's point that he was making earlier as well, that the principle probably is going to

extend to most secondary picketing, but fortunately the facts of this case demonstrate how extreme the situation can be.

QUESTION: Suppose it was perfectly clear from the Railway Labor Act that as far as that Act was concerned it neither prohibited secondary picketing nor permitted it. Would the Norris-LaGuardia Act prohibit the injunction then?

MR. LEE: We think not because -- you mean either under its terms or as influenced by its policies?

QUESTION: Well, just say the Railway Labor Act said we do not intend to prohibit secondary picketing. That is what it said, and then along came the Norris-LaGuardia Act.

MR. LEE: Then I think our case would be much more difficult. It wouldn't be totally abandoned, because under the Eighth Circuit's opinion, and there is a portion of our brief that is devoted to this, it would lead us to the question of whether the Eighth Circuit's opinion naturally drew --

QUESTION: Let's assume, though, that the Norris-LaGuardia Act would on my supposition prohibit the injunction.

MR. LEE: Yes.

QUESTION: Now -- and then the Railway Labor

Act is amended to say that secondary picketing is prohibited. Now, does that -- what do you say about the Norris-LaGuardia Act then? Do you say it has been partially repealed? Do you say -- what do you say?

MR. LEE: No, I said that is a very easy case for me at that point, because this Court has said in Chicago River and in Chicago and Northwest very plainly that where you have that circumstance you accommodate the two, and that unlike other statutes, unlike other nonlabor statutes, that the accommodation means that Norris-LaGuardia does not prohibit enjoining activity which violates the Railway Labor Act.

QUESTION: So the usual rule about partial repeal just isn't applicable in the sense that --

MR. LEE: You don't talk of it.

QUESTION: -- in the sense that it ought to be really clear. You shouldn't just have to infer it.

MR. LEE: That is correct. Now, in this case, fortunately for us, the RLA came before Norris-LaGuardia, so there isn't that matter, but even so, the language, the approach that this Court has taken in those two cases is not one of partial repeal.

QUESTION: Well, I would think that the argument would be under Norris-LaGuardia since the Railway Labot Act was prior thereto that you could say

whatever was true under the Railway Labor Act before that the Norris-LaGuardia was intended to prevent an injunction.

MR. LEE: Yes, but our view is and this is certainly -- if that principle applied without any accommodation, then you have to overrule at least Chicago River and Chicago and Northwestern, in both of which cases injunctions were upheld solely in activity arising out of a labor dispute solely on the ground that the substantive activity was a violation of the Railway Labor Act.

What we are really asking for is simply this The Act does not prescribe specifically what happens after the major dispute resolution processes have been exhausted. That is a question whose resolution must be anchored to the purpose of the Act.

One aspect of that question has already been answered by this Court by reference to the purpose of the Act. It was the holding very early in the game in Brotherhood of Engineers versus Baltimore and Ohio, in which the Court held that on the union side, though the Railway Labor Act does not explicitly guarantee the right to strike against the primary employer following exhaustion of the negotiation and mediation requirements, there is inferred a right to strike from

the Act's failure to provide compulsory arbitration with respect to major disputes.

What we are asking for, we think, necessarily follows from this Court's holding that the union can resort to some kinds of self-help following exhaustion of the major dispute resolution procedures. The Second Circuit held just last summer, frankly, I think, probably correctly, that those procedures are not available to employers other than the primary employer.

It follows, we submit, that the right of self-help against those other employers is also unavailable because it is nothing short of preposterous to assume that Congress would have so carefully prescribed protracted procedures which must be exhausted vis-a-vis the primary employer before resort to self-help against that employer is permitted and then would have permitted unlimited self-help which at any level against any employer must itself be inferred against carriers who are not even parties to the dispute, employers who the Second Circuit has held cannot invoke the negotiation and mediation strike-delaying proceedings and are therefore left without those core protections.

QUESTION: How about railroads interconnecting with this railroad?

MR. LEE: Those would be the hard cases, the kinds of cases in which you would have to ask to what extent there is a substantial alignment.

Fortunately, in this case there is no interconnection between any of my clients and either of the struck parties. We think that this case is especially compelling where, as you point out, Justice White, in this instance self-help against the primary employer will affect -- will affect none of the carriers that even interconnect with that primary employer, because whereas the self-help against the primary employer will affect an area limited at most to a few states in New England, the purpose of the picketing against my clients is, as the Court of Appeals conceded, to shut down the nation's entire railroad system.

And since that is tantamount to shut down the nation itself, there is simply no reason to assume that Congress intended to have railroad unions to have that long a lever, longer than is available to any other union in the country.

Congress gave us a carefully crafted structure for preventing interruptions to railroad service. What it anticipated is that those would be resolved by negotiation, by agreement, and not by self-help, but if unions such as this one know that once they have

exhausted the statutory procedures vis-a-vis the primary employer, and they are then free to employ a weapon many times more powerful than a primary strike, a weapon capable of bringing the entire nation to its knees, because the statutory prerequisites to a strike, so carefully prescribed by Congress vis-a-vis the primary employer, are totally unavailable to the Union's new victims once it resorts to a nationwide rail stoppage, then the entire -- the most important purpose of the Railway Labor Act will have been completely perverted.

It is small wonder that in the 60 years that we have had the Railway Labor Act, that this is the first instance in which any court has ever upheld, that is, the cases that came down this last summer, any court has ever upheld such picketing.

Unless the Court has questions, Mr. Chief Justice, I will reserve the rest of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

We will hear now from you, Mr. Clarke.

ORAL ARGUMENT OF JOHN O'B. CLARKE, JR., ESQ.,
ON BEHALF OF THE RESPONDENTS

MR. CLARKE: Mr. Chief Justice, may it please the Court, the petitioners in this case center on the 1926 Railway Labor Act as being the focal Act on which to examine to determine whether or not the unions do

have a right to ask other railroad employees to help them in their dispute. Now, the unions submit that the appropriate Act to look at and to examine is the Norris-LaGuardia Act, the 1932 Act, and before we get into that, it would be helpful, we submit, to go back to the facts in this case to see exactly what is at issue here.

This is not the typical or the secondary boycott type of concept that was in existence around the turn of the century. What is involved here is a union going to other railroad employees and asking those employees to help them in their struggle by withholding their labor because the union believes that by withholding their labor they will put sufficient pressure on the primary employer to have that primary employer negotiate.

QUESTION: That is a strike, isn't it?

MR. CLARKE: It is. It is a sympathy strike. Around the turn of the century this was looked at as being a sympathy strike, but it also had the elements of what was called at that time a secondary boycott, putting pressure upon a neutral employer to require that employer to stop doing business with the primary employer. There is a distinction in labor law between sympathy strikes and secondary boycotts which is often

overshadowed or mixed together.

But going to this particular case, what we are dealing with, as we indicated, is simply the request by a union to other employees to withhold their labor. It involves two aspects that are essentially fundamental to all individuals, the right of free speech and a right to withhold one's labor. Now, in 1932 Congress enacted the Norris-LaGuardia Act, which specifically informed the courts of two particular things that are relevant here.

First, they told the courts, we don't want you involved in labor disputes in determining what is proper and what is not proper conduct. That is not your function. That is our function, so you stay out of it. Secondly, Congress said, we are going to tell you what is proper conduct, and in Section 4 of the Act they specifically enumerated several types of conduct which they said, from now on, as we said in 1914 but no one would listen, and we say again, those types of conducts are conduct that cannot be enjoined.

QUESTION: So you could accept everything Mr. Lee says about the Railway Labor Act and still conclude that you shouldn't win here, that even if this secondary picketing would have violated the Railway Labor Act, prior to Norris-LaGuardia, or even now, it can't be enjoined.

MR. CLARKE: Your Honor, that is correct, but we don't accept the fact that the 1926 --

QUESTION: Well, I know, but is that your position or not?

MR. CLARKE: It is -- the Norris-LaGuardia Act controls. Whether the Railway Labor Act has an implicit ban on secondary picketing, which we submit it does not, the Norris-LaGuardia Act controls this case. In 1932 --

QUESTION: Even if -- no matter what the Railway Labor Act says.

MR. CLARKE: Because the Railway Labor Act does not have an explicit prohibition against secondary picketing.

QUESTION: Well, let's assume that -- it isn't explicit, but let's assume that you would infer it, as Mr. Lee suggests. Then what would you say about Norris-LaGuardia? You say it still controls?

MR. CLARKE: We would submit it still controls because it was the latter statute addressed to a specific problem.

QUESTION: The later statute?

MR. CLARKE: The later statute, addressed to a specific problem, namely, what forms of self-help --

QUESTION: What do you do about our later cases?

QUESTION: Yes, Chicago and Northwestern, Chicago River.

MR. CLARKE: Yes, Your Honor. The Chicago River case was an interpretation of the 1934 amendments, amendments that occurred two years after the Norris-LaGuardia was enacted, and the 1934 amendment was a specific sale, in a sense, by rail labor of its right to strike in exchange for the National Railroad Adjustment Board.

QUESTION: But Chicago and Northwestern in 402 US as I read it is a statement that the railroads had a duty to do something under the Railway Labor Act. They did not do it, and therefore a strike may be enjoined without -- the court made nothing of the fact that there is no express prohibition against secondary picketing.

MR. CLARKE: But the court did make a point of the fact that the Railway Labor Act's heart was the duty to exert every reasonable effort to reach a conclusion, to reach an agreement with the carriers, and that in that case the union was, according to the complaint, simply engaging in perfunctory bargaining, where it did not comply with the Act.

Now, but we are not at that extreme point that Mr. Justice White asked us. We are back to this point that the Railway Labor Act does not implicitly or

explicitly prohibit secondary picketing. Now, there is the difference between --

QUESTION: Mr. Clarke, what has happened in all these 60 years when instances have arisen of attempts to have secondary picketing of railroads?

MR. CLARKE: Secondary picketing of railroads is -- there is a lot of historical development that has occurred in the past 60 yeas that the Railway Labor Act has been in existence. When you go back to the actual reports of the National Mediation Board, what is shown is that between 1926, when the Act was enacted, and World War II, there were very few strikes.

There were approximately three strikes during that time period. And from -- during World War Two up until shortly after that, around 1946, the unions still tried to restrain from striking, but there were a few cases where they were going to engage in strikes, and Congress or the President first tried to draft the people, and then Congress was considering enacting legislation.

So the need for the full development or the need for the full use of the economic power of the unions did not occur during this time period. But what also occurred during this time period was the multiple bargaining type, what is called national handling in the

rail industry, that the unions negotiated nationally with all of the railroads and groups for wages and other factors that occurred during the thirties, so when the strike occurred it was a strike against everybody.

Now, to say that because in the past there hasn't been this secondary picketing means that there is no such right of secondary picketing is an attempt to use the gloss of today's experience to interpret what was in existence back at that time period, which just can't be done. And the first -- when you finally got to the breaking of the national handling, individual strikes around the Florida East Coast time, secondary picketing was used, but the courts at that point stepped right into the fracas and enjoined it.

Now fortunately, the Fifth Circuit in the 1966 Florida -- or Atlantic Coastline case set aside the injunction, but the state courts entered the void that the federal courts had left and enjoined the secondary activity. The next real strike where this occurred was the 1978 strike, and again, it was the courts that entered and eventually after about two months they broke the injunctions loose, but for two months the unions were enjoined from engaging in their full economic power. Then the next strike was the one we are dealing with now.

QUESTION: What did the injunction prohibit here?

MR. CLARKE: The injunction prohibited the Brotherhood of Maintenance of Way from placing pickets near the facilities of the carriers involved in this case, the eight carriers, to ask their employees to withhold their labor. It also prohibited the employees of those carriers for withholding their labor, so the injunction prohibited two forms, the speech, namely, placing the pickets, and secondly, the withholding of labor, prohibited the withholding of labor.

That is what was enjoined in this case. The union in a sense called for a sympathy strike, and the courts said we could not, and that was the injunction that was in place for approximately 40 days, with various injunctions, and in the meantime the Act which was set up by agreement of the parties back in 1926, and this is why we say the 1926 Act cannot have this effect of outlawing secondary picketing, that the petitioners say, is because it was an agreement between the union and the management.

QUESTION: What was the prevailing rule at that time before the Act about the enjoinability of secondary picketing?

MR. CLARKE: Secondary activity was enjoinable

but primary activity --

QUESTION: It was illegal.

MR. CLARKE: It was --

QUESTION: It was held to be illegal.

MR. CLARKE: The courts --

QUESTION: And it was enjoinable.

MR. CLARKE: Yes, Your Honor. The courts considered enjoinment --

QUESTION: And you think the Railway Labor Act was intended to change that rule?

MR. CLARKE: No, Your Honor. That is the point we are trying to make. The Railway Labor Act did not touch what occurs once the Act's processes were exhausted. What the Railway Labor Act was was a union and -- the management and labor getting together and working out a process that would make the need to engage in self-help academic.

QUESTION: I understand.

MR. CLARKE: The Act did not touch --

QUESTION: The law was, the existing law was that secondary picketing was not enjoinable no matter when it occurred prior to the Railway Labor Act.

MR. CLARKE: Prior to the Railway Labor Act, the law was that secondary picketing was enjoinable.

QUESTION: Exactly.

MR. CLARKE: That primary --

QUESTION: Why wasn't it enjoinable afterwards?

MR. CLARKE: It was not enjoinable afterwards because of the 1932 Norris-LaGuardia Act.

QUESTION: I know, but between '26 and '32 it was enjoinable?

MR. CLARKE: We submit it was enjoinable for the law that existed prior to that time, but primary strikes were enjoinable prior to that time. The shopmen's strike and the switchmen's strike that occurred in 1920 and 1922, in those two strikes the government went in because of the interference with interstate commerce and obtained injunctions against those strikes.

QUESTION: Didn't the Court of Appeals say that the Norris-LaGuardia Act prevents this injunction even if the secondary picketing in this case violated the Railway Labor Act?

MR. CLARKE: That is correct, Your Honor.

QUESTION: Do you defend that?

MR. CLARKE: Yes, Your Honor, we do.

QUESTION: All right.

MR. CLARKE: And we defend that on this ground. The Norris-LaGuardia Act cannot be read in a

vacuum, and the Railway Labor Act cannot be read in vacuum. The two have to be read together, but the policies expressed by the Norris-LaGuardia Act control.

QUESTION: But that is contrary to the holding of the court in the Northwestern case.

MR. CLARKE: We submit it is not, Your Honor, because in the Northwest case you had a specific requirement in the Act that was not being complied with, and the requirement in the Act that was not being complied with was the duty to exert every reasonable effort to reach an agreement.

QUESTION: So the union was violating the Railway Labor Act. It called a strike and the strike was enjoined, and this Court upheld the injunction.

MR. CLARKE: That's correct, Your Honor, because the specific command of the Railway Labor Act was not followed. Now, the difference between that type of situation and what we are dealing with here is that in order to uphold the petitioners in this case, and in order to enjoin the type of activity involved here, the courts will have to develop what type of conduct is permissible and what type of conduct is not permissible where there is no specific standard in the Act --

QUESTION: I can see that point, but I thought you were saying that even though there is a violation of

the Railway Labor Act here on the part of the union, the Norris-LaGuardia Act flatly prohibits any sort of injunction.

QUESTION: That is what you are defending, isn't it?

MR. CLARKE: Yes, Your Honor, we are defending that.

QUESTION: And you say that is consistent with the Northwestern case?

MR. CLARKE: Yes, Your Honor. As long -- there has to be a violation of a specific --

QUESTION: You agree if there is a violation of an express prohibition in the Railway Labor Act in a strike, that strike may be enjoined notwithstanding the Norris-LaGuardia Act?

MR. CLARKE: Yes, Your Honor. Where there is an express command of the Railway Labor Act there can be an injunction notwithstanding the Norris-LaGuardia Act, because when the Norris-LaGuardia Act was enacted the legislative history is clear that it was intended to apply before the Norris-LaGuardia Act would apply. In other words, what Representative LaGuardia said during the debates, rail labor would not think of going out on strike before they had complied with the Act. Now, if there is a failure to comply with the Act the court can

accommodate the two statutes and enforce the compliance with the Act before the strike can take place, but once there has been compliance with the Act, as there was here, to then come in an say that the Railway Labor Act has some nebulous ban against secondary picketing is to bring the court right back into the fracas that Congress in 1914 and again in 1932 said you are not supposed to be in.

QUESTION: Mr. Clarke --

MR. CLARKE: Yes, Your Honor.

QUESTION: Let's move on and assume, for example, you win this case and secondary picketing not only continues to exist but expands so that the railroads are shut down, half of the United States. What happens then?

MR. CLARKE: Your Honor, the Act --

QUESTION: Are the courts powerless then?

MR. CLARKE: Yes, Your Honor. The Act has already built in the standards, and -- I am sorry to interrupt you.

QUESTION: So the railroads would stay shut down until Congress acted.

MR. CLARKE: Yes, Your Honor, but first of all there is Section 10 in the Act --

QUESTION: Two months?

MR. CLARKE: There is section 10 in the Act, Your Honor, which allows an immediate cessation of all sorts of self-help, which is what occurred in this case. Then if that doesn't work then Congress has the power as it did in this case to extend the status quo and finally to impose a solution. That is in a sense what this comes down to is that the courts are not the guardian of what is and what is not in the public interest. That is Congress.

QUESTION: Only with respect to railroads and airlines?

MR. CLARKE: No, Your Honor, with respect to any industry. No industrial management --

QUESTION: Under Taft-Hartley secondary boycotts are not permitted.

MR. CLARKE: Yes, Your Honor, but the private party cannot come in and get an injunction. The only one who can come to the court to get the injunction is the National Labor Relations Board.

QUESTION: That is by virtue of express Congressional consent.

MR. CLARKE: That is correct, Your Honor, which we do not have here, so the --

QUESTION: What is the situation with respect to the trucking companies?

MR. CLARKE: The trucking companies would be the same, Your Honor.

QUESTION: The same as what?

MR. CLARKE: The National Labor Relations Board has to go to the court to get the --

QUESTION: I understand that, but is there anything comparable to Norris-LaGuardia with respect to the trucking companies?

MR. CLARKE: Your Honor, the Norris-LaGuardia Act still applies to prohibit the individual trucker from going into court to get the injunction. But what is different between the two Acts is that the Railway Labor Act has Section 10, which the National Labor Relations Act does not have. Section 10 is the protecter of the public interest.

It was intended by the drafters of the Act to be the protecter of the public interest. And it was the use of Section 10 from 1926 up until the National Mediation Board changed its system in the 1960s that prohibited strikes. Section 10 is what Congress intended to be the guardian of the public interest, not the courts.

QUESTION: Come back to my question, let's assume, for example, that half the railroads in the United States were shut down by secondary picketing. Is

the only relief Congress?

MR. CLARKE: Yes, Your Honor, if Section 10 had been used.

QUESTION: That could take a certain amount of time, I assume.

MR. CLARKE: It could take a day.

QUESTION: A day?

MR. CLARKE: Or it could take longer than a day.

QUESTION: What is Section 10?

MR. CLARKE: Section 10, Your Honor, is the section which provides that if in the opinion of the National Mediation Board the strike activity threatens to interfere with the rail transportation in the region of the country, they shall inform the President who may in his discretion create an emergency board. If the emergency board is created, all self-help activity ceases --

QUESTION: For a --

MR. CLARKE: -- for a period of 30 days after the --

QUESTION: This is the cooling off?

MR. CLARKE: Yes, Your Honor. It is normally a 60-day period. It may vary a little bit.

QUESTION: Yes, okay.

QUESTION: May I come back again? I am sorry to keep interrupting you, but it is not yet clear to me. Taft-Hartley applies to every industry in the United States except railroads and airlines?

MR. CLARKE: That is correct, Your Honor.

QUESTION: So truckers who --

MR. CLARKE: Every interstate commerce industry.

QUESTION: Trucker who compete with railroads are subject to different laws?

MR. CLARKE: That is correct, Your Honor. To the Taft-Hartley Act.

QUESTION: May I ask you one other question? Then I will try to keep quiet.

MR. CLARKE: Yes, sir.

QUESTION: What is your view with respect to the substantial alignment issue? I think I can anticipate it, but I would like to hear you say it.

MR. CLARKE: We submit, Your Honor, there are no standards in either the Railway Labor Act nor the Norris-LaGuardia Act that would in any way justify the adoption of a substantial alignment doctrine. The Act specifically says that the courts are to be out of interpreting what is and what is not permissible conduct, and unless there are standards by Congress that

the Courts are authorized to interpret, as this Court said in the Jacksonville Terminal case, the courts should not enter this particular area.

Now, this brings us -- the question in this case, and this is why we are not -- although we defend and we submit the court is correct, the Court of Appeals was correct, that the Norris-LaGuardia Act would control even if there was an implicit ban against secondary picketing in the Railway Labor Act, we submit when you go back to the history and to the facts, the development of the Railway Labor Act, that is not so.

And as this Court held in the Jacksonville Terminal case, there is nothing in the Railway Labor Act which outlaws secondary picketing, secondary activity. The courts in that case, and that was, we submit, the more difficult case than is facing this Court today, because the Norris-LaGuardia Act did not apply to states, the court had to look in the Jacksonville Terminal case at the body of law, the federal law that existed as to what was and what was not permissible self-help. And it looked to the body of law that developed into the National Labor Relations Act.

Now, in the National Labor Relations Act in 1947 Congress decided that secondary activities should be prohibited but when it did that it specifically

limited the banning of secondary activities to industries that were covered by the National Labor Relations Act, and did not extend it to the railroads.

In 1959 Congress extended to the railroads the protection against secondary picketing by nonrailroad unions but again did not extend the ban against secondary picketing, secondary activity to the railroads, so what this court faced in the Jacksonville Terminal case was a body of law, body of labor law that did say that some forms of secondary picketing were improper but some forms of secondary conduct were proper.

And the court then faced the question, how do we determine which are proper and which are not proper, and it indicated that was one of the most complex areas of labor law.

QUESTION: Could I ask you, why would you say that nonconnecting roads have a dispute with the employer, or why would you say picketing them arose out of a labor dispute?

MR. CLARKE: Because the only reason the union would engage in picketing of the Burlington Northern or the western carriers would be to aid its dispute with --

QUESTION: What if they went around and picketed the railroad's customers, the people who were

shippers?

MR. CLARKE: At that point, Your Honor, you are outside the industry.

QUESTION: Well, nevertheless, the only reason that you are -- you still have a dispute with your own employer, and you want to put pressure on him, so you go around and talk to the people in other unions in the grain business or in the wood business, and say, stop dealing with this railroad until they topple over. Why wouldn't that be perfectly all right?

MR. CLARKE: Well, we submit it is all right, but that is --

QUESTION: Well, I know, but what would it violate?

MR. CLARKE: It would not violate --

QUESTION: It wouldn't be protected by the Norris-LaGuardia Act?

MR. CLARKE: Yes, Your Honor, we --

QUESTION: Because it doesn't arise out of a labor dispute.

MR. CLARKE: No, it does not arise in the same industry.

QUESTION: But you can picket a railroad in Los Angeles just because it is a railroad.

MR. CLARKE: No, Your Honor. We can picket a

railroad in Los Angeles because the union has determined that it is in its interest to do so. The courts cannot enjoin it because it is in the same industry.

QUESTION: The same industry?

MR. CLARKE: Yes, Your Honor, that is in Section 13(b) of the National -- of the Norris-LaGuardia Act.

QUESTION: Well, I know, but why does that arise out of a labor dispute and picketing shippers of logs in Maine does not?

MR. CLARKE: It does. The picketing of the shippers of logs in Maine would arise out of a labor dispute.

QUESTION: But what?

MR. CLARKE: But it is not the type of conduct that is protected by the Norris-LaGuardia Act because it does not pertain to the same industry, which is 13(b) of the Act. The Act requires that in order to -- who is the person participating or interested in the dispute, it has limitations on it. Those limitations are spelled out in 13(a), (b), and (c). 13(b) was an adoption of what Professor Frankfurter noted was the New York law that the picketing of a neutral was proper so long as the neutral was in the same industry that the primary disputant was engaged in, or the employees were engaged

in, or involves the same craft.

QUESTION: What would be the basis for the injunction against picketing the neutral wood shipper?

MR. CLARKE: Your Honor, the second question that comes up besides the Norris-LaGuardia Act issue is whether there is anything that is wrong about that type of conduct. Now, the typical basis for the injunction would be that it is a nuisance, or that it is an interference with the individual's right to do business, and that raises a question as to whether this is the --

QUESTION: Well, anyway, your argument is that picketing the Los Angeles railroad is okay, but picketing the log shipper isn't all right.

MR. CLARKE: It is not lawful now unless Congress changes it.

QUESTION: I mean, it isn't protected by Norris-LaGuardia.

MR. CLARKE: I said lawful. It is not protected, and it is not protected unless Congress changes the law to allow it to be done, and that is what we are really faced with in this case.

QUESTION: Mr. Clarke, let me interrupt you there. I understand your argument that that picketing would not be protected by Norris-LaGuardia, but under your basic -- but would you also -- would you say there

is any federal prohibition against that picketing?

MR. CLARKE: No, Your Honor.

QUESTION: So that picketing also could not be enjoined under your view of the --

MR. CLARKE: Your Honor, we would submit that it could not be enjoined because it is lawful --

QUESTION: I understand.

MR. CLARKE: -- under the last part of the Clayton Act.

QUESTION: And on that you do not rely on the Norris-LaGuardia Act, just simply there is an absence of a federal prohibition against it.

MR. CLARKE: That is correct, Your Honor. Well, the question then comes down to --

QUESTION: What about state law?

MR. CLARKE: That is the point that I was getting to. The last clause of Section 20 of the Clayton Act eliminates all federal law, this type of conduct as being a violation of, but Congress specifically limited it only to federal law and not to state law. Initially in the House it was "nor shall any of the above Acts be considered a violation of any law," or "shall be considered unlawful." And then it was changed in the Senate and in the conference to "any law of the United States."

So the question will then -- then the question turns on whether or not that form of conduct is the protected unregulated activity, and that question turns on whether or not a body of labor law would protect this type of activity, and since the Norris-LaGuardia Act is a good indication of what our body of labor law is, especially as it pertains to these cases, it would not be protected unregulated activity.

QUESTION: Mr. Clarke --

MR. CLARKE: Yes, Your Honor.

QUESTION: Is there a public policy reason to treat railroads differently in this respect from truckers that compete?

MR. CLARKE: Not insofar as what is proper forms of self-help. The public policy considerations are matters that Congress should consider in devising what is proper and what is not proper in self-help, but not for the court's interpretation, and that is the point that we submit the Norris-LaGuardia Act was intended to bring home.

QUESTION: Yes, but my question -- perhaps I don't understand the situation -- is that if a railroad is competing directly with a trucking firm why should labor law be different with respect to the two so that you could have an injunction, the NLRB could bring an

injunction against a trucker, couldn't it?

MR. CLARKE: Well, Your Honor, the labor law would be different, because under the NLRA, it is the NLRB, it is the board that has to come to the court.

QUESTION: I understand that.

MR. CLARKE: Here it is the individual carrier that can come to the court and seek the injunction.

QUESTION: Yes.

MR. CLARKE: But that is -- the difference is the fact that the Railway Labor Act --

QUESTION: But there can be an injunction in one case but not in the other? That is my point.

MR. CLARKE: Yes, Your Honor, but only at the request of the government, and in a rail case there can be no injunction. In the trucker case there can be an injunction but at the request of the government. That is what Congress set up. Congress for --

QUESTION: I understand Congress set it up. I was just wondering why they draw the distinction.

MR. CLARKE: Well, the distinction is basically historical, Your Honor. The distinction is that in 1926 all of the other industries were not covered by any specific legislation fostering collective bargaining. The railroad management and unions got together and presented Congress with a scheme that

Congress adopted that fostered collective bargaining but left wholly silent what occurs once that collective bargaining expires.

Now, that is the difference, we submit, between -- well, the distinction on the Florida East Coast case that the carriers rely upon. Florida East Coast was not a case in which the court modified the right of self-help. If anything, the court -- what the court did was modify the Railway Labor Act. Section 2 seventh of the Railway Labor Act prohibits the changing of any collective bargaining provision in the contract except in conformance with Section 6 of the Act, the notice of negotiation.

The court indicated and held in Florida East Coast that that section still applied during a strike situation. There was nothing in the Act which indicated it should expire, but the Court said, if it applied it would limit the right of self-help that a carrier has and therefore we will read into 2 seventh, into the Railway Labor Act, an exception to the full application of 2 seventh and if the carrier can show a court that changes are necessary to enable continued operations during the strike, then those changes can be made notwithstanding 2 seventh of the Act.

That is entirely different from what we are

talking about here, where the petitioners are trying to say you have to read into the Act some form of modification to the right of self-help, which the Act didn't touch at all.

QUESTION: Could I ask you, what if there had been no picketing, but the head of the union in Los Angeles was a brother of the head of the union in Maine, and he said, well, I just think we ought to help these people out, and he got a lot of other unions, they just walked out on their employers.

MR. CLARKE: Your Honor, the Act --

QUESTION: That is a sympathy strike.

MR. CLARKE: Yes, Your Honor.

QUESTION: Would they have had to go through some procedures before they could strike?

MR. CLARKE: No, Your Honor. If it is in support of another employee strike which is a lawful strike, and if it arises out of the labor dispute, which it would because they are making common cause to help those people, then it would be under Section -- it would be part of the specifically enumerated conduct under Section 4, namely, Section 4A.

QUESTION: Of the --

MR. CLARKE: Norris-LaGuardia Act, which says that no court --

QUESTION: Would they have to go through the procedures of the Railroad Labor Act to strike?

MR. CLARKE: No, Your Honor.

QUESTION: Because?

MR. CLARKE: It is a sympathy strike in support of the employees up in Maine.

QUESTION: And that is expressly excluded?

MR. CLARKE: Section 4(a) specifically says that no court may enjoin the refusal to work.

QUESTION: That is Norris-LaGuardia.

MR. CLARKE: Yes, Your Honor.

QUESTION: But what about the procedures required by the Railway Labor Act before you can --

MR. CLARKE: There is no --

QUESTION: Before you can strike?

MR. CLARKE: Yes, Your Honor. There is no dispute between the employees in Los Angeles and their carrier that the Railway Labor Act applies to. That is not a dispute under the Railway Labor Act. It is an action taken in support of a labor dispute in another area. And that is the one distinction that has to be kept in mind in considering the Railway Labor Act.

The Railway Labor Act is a craft statute. It is one that is made up of different crafts. On the Maine Central area there are something like 14 different

unions. Now, none of those unions had gone through the major dispute processes.

CHIEF JUSTICE REHNQUIST: Mr. Clarke, your time has expired.

MR. CLARKE: Yes, Your Honor.

CHIEF JUSTICE REHNQUIST: Mr. Lee, you have six minutes remaining.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. LEE: I won't need that much, Mr. Chief Justice.

It seems to me that the resolution of this case has become very obvious in light of what Mr. Clarke has said, stated in about four sequential steps. In 1926, the universal rule was secondary picketing was enjoinable and also, more important for our purposes, unlawful. In that --

QUESTION: Mr. Lee, why is that important for your purposes if you find the prohibition against this activity in the Railway Labor Act? Why is it important that it was enjoinable in 1926, because you didn't rely on the Sherman Act --

MR. LEE: More important than it was enjoinable is the fact that it was unlawful.

QUESTION: That it was unlawful under the

Sherman Act, and I don't understand you to be relying on the Sherman Act today.

MR. LEE: That is correct. It was universally regarded as simply unlawful under the totality of law.

QUESTION: Okay.

MR. LEE: In 1926, in that setting Congress gave us a law which Congress said was not intended to answer all of the questions but simply to set forth the general principles and then leave it to the courts to develop as the common law had developed.

QUESTION: But if you are right about that, it doesn't seem to me you need the unlawfulness prior to 1926. It seems to me you just rest on that. It seems to me that is the position you are taking today. I wasn't quite clear on your brief.

MR. LEE: I think that's correct. I think that's correct, but the fact -- it simply strengthens our position that that was the assumption that they made in 1926.

QUESTION: Well, they may have made the assumption, but they didn't write it into the law.

MR. LEE: That is correct.

QUESTION: But you think they intended that some time a court could say, could infer that the Act covers it?

MR. LEE: What we clearly know, Justice White -- we don't know whether they were thinking about secondary picketing. We do know that they said, we don't know all the answers, and because we don't know all the answers we want this to be the kind of a statute that we set forth the general principles and then we are going to rely on the courts, just the way the common law has developed to fill in the responses, and that is exactly what this Court has done.

Now, if you hold that the Norris-LaGuardia Act prohibits enjoining a violation of the Railway Labor Act, then you have got some cases to overrule, and there is just no question about that. Now, my friend, Mr. Clarke, said that as to the Chicago and Northwestern case that there there was a violation of a specific provision which he said was the heart of the Act. He is right on both counts. It was the heart of the Act.

The heart of the Act that the Court said was violated in that instance was exactly the same provision that we are relying on here, Section 2 first. The specific guarantee, the specific violation was not written into the Act. It was an obligation to bargain in good faith, and that had to be inferred, that had to be inferred from the Act.

Now, we come next to the question --

QUESTION: What is the cognate obligation here similar to the one you referred to in Chicago and Northwestern of the union which it violated?

MR. LEE: Yes, the cognate obligation is the identical one. The obligation that is written into the statute is to make and maintain agreements in such a way that there -- is to minimize the interruptions to interstate commerce, and there is no single practice that is as interruptive of interstate commerce as is this particular practice that --

QUESTION: Mr. Lee, if that is correct, supposing you had nationwide bargaining going on. I take it then that even after the exhaustion of the RLA procedures you would say there could be no rail strike.

MR. LEE: No, not that there could be no rail strike. If it were nationwide, if it were nationwide, then --

QUESTION: I mean, it seems to me your reasoning leads to the conclusion that because the statute was designed to prevent strikes, and once you exhaust the procedures and they don't work, the only way to achieve the object of the Act is to enjoin a strike.

MR. LEE: No, it doesn't say -- it does not say that there will be no strikes, and this Court has held that at a certain point in time there can be

strikes. We are not taking the position that there can't be. We are just saying that its principal purpose was to avoid that if at all possible.

Now, what this Court clearly has held in a case that really isn't given the play that it ought to have been is this Florida East Coast case, which also says that even when you come to the exhaustion of those procedures vis-a-vis the primary employer it is still not law of the jungle. You still have to look to see whether in light of the overall purposes of the Act what the rule should be with respect to the parties' rights of self-help after that point in time.

QUESTION: You are saying, making common law, you would say you could still picket interconnecting lines?

MR. LEE: That gets to the tough case. And you would have to look -- you would borrow, Justice White, at that point you would borrow from the related doctrines that this Court has developed under the National Labor Relations Act as the Court has held so many times that it is proper to do.

My time is up, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

The case is submitted.

(Whereupon, at 11:02 o'clock p.m., the case in

the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

86-39 - BURLINGTON NORTHERN RAILROAD COMPANY, ET AL., Petitioners v. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, ET AL.,

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BY Paul A. Richardson

(REPORTER)